Associated Pan Malaysia Cement Sdn Bhd v Westwood Development Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCVC-352–03 OF 2012
VAZEER ALAM MYDIN JC
31 MAY 2013

Land Law — Ownership — Claim for — State authority alienated part of mining land ('disputed area') to defendant developer — Mining lessee claimed that defendant had obtained ownership of land titles in disputed area after misleading Director of Survey and Mapping Selangor to approve new survey plan — Whether plaintiff had valid mining lease — Whether 2005 survey plan conclusive evidence of boundaries and area of mining land — Res judicata — Whether plaintiff's status as mining lessee and conclusiveness of 2005 survey plan were res judicata — Whether disputed area could be alienated by state to defendant — Whether defendant's titles for disputed area indefeasible — Counterclaim — Whether there had been material suppression of material facts — Fraud — Whether failure to adduce evidence constituted fraud — Whether defendant's counterclaim should be allowed — National Land Code ss 5(d), 396A & 340(2)(c)

The plaintiff had a valid mining lease for land held in Gombak, Selangor ('the mining land') expiring on 31 December 2003. On 16 August 2002, ie twelve months before the expiry of the mining lease, the plaintiff applied for a renewal of the lease. On 13 August 2003, the Majlis Mesyuarat Kerajaan Negeri Selangor ('the MMKN') granted the plaintiff conditional approval of the mining lease. Sometime in October 2010, the defendant, a developer, sought to develop the land adjacent to the mining land. The plaintiff discovered that the defendant's development would encroach onto approximately four acres at the southern boundary of the mining land ('the disputed area'). On 31 January 2011, the plaintiff filed a civil suit against the defendant ('the 2011 suit') to determine the boundary of the mining land and for a declaration that the defendant's proposed development encroached onto its mining land, namely the disputed area. The plaintiff relied on a 2005 survey plan that was approved by the Director of Survey and Mapping Selangor ('JUPEM') to support its contention that the disputed area belonged to it. At the close of the trial of the 2011 suit, the High Court had granted the plaintiff a declaration that the southern boundary of the mining land was as per the 2005 survey plan and a declaration that any development by the defendant that encroached onto the disputed area would constitute an encroachment into the plaintiff's mining land (the 2011 court order). Subsequently, the disputed area was alienated by the state authority and subdivided into more than 55 land titles in favour of the defendant. The plaintiff alleged that the defendant had obtained ownership of

land titles in the disputed area after it misled the JUPEM to approve a new survey plan, which stipulated that the disputed area was no longer part of the plaintiff's mining land but part of the defendant's development. For these reasons the plaintiff commenced a suit against the defendant. It was the plaintiff's case that the defendant had obtained ownership of land titles within the disputed area from the state authority by acting in breach of the 2011 court order, and that this had resulted in the plaintiff suffering loss and damage. The plaintiff contended that the new survey plan and the land titles issued in favour of the defendant in respect of the disputed area were null and void and the land titles were defeasible pursuant to s 340(2) of the National Land Code (NLC). The plaintiff averred that the issue as to whether the disputed area was part of the mining land belonging to the plaintiff was res judicata and the defendant was estopped from alleging it had any rights over the same. The defendant responded that it was the registered proprietor of the disputed area, which had been alienated to it by the state authority and that the plaintiff did not hold a valid and registered mining lease of the mining land. The defendant also challenged the validity of the 2005 survey plan relied upon by the plaintiff and submitted that the said plan dealt with boundaries and not ownership. It was the defendant's contention that the 2011 order did not conclusively decide as to the ownership of the disputed area especially since the plaintiff had failed to disclose the decision of the Mesyuarat Tindakan Eknomi Negeri Selangor ('MTES') directing the plaintiff to engage a licensed land surveyor to perform a new survey of the mining land that excluded the disputed area. The defendant thus argued that the plaintiff had committed fraud by withholding material facts that had misled the court into accepting the 2005 survey plan and accepting the said plan as valid and binding. Consequently the defendant filed a counterclaim to, inter alia, set aside the 2011 order as null and void, damages to be assessed, interest and costs.

Held, allowing the plaintiff's claim and dismissing the defendant's counterclaim with costs of RM90,000 globally:

(1) There was uncontroverted evidence that the plaintiff had applied for a renewal of the mining lease and that the MMKN had granted it conditional approval. As the plaintiff was not agreeable to some of the conditions raised by MMKN, it had filed an appeal against those conditions. In the circumstances, it could not be said that the renewal application had been determined with finality, as submitted by the defendant. Therefore pursuant to s 66(9) of the Mineral (Selangor) Enactment 2000 ('the MSE'), the terms of the expired mining lease would continue in force until the renewal application was either rejected or approved. Further, the instances of delay on the part of the plaintiff did not vitiate the lease renewal approval. In addition, the defendant had not challenged the finding of the High Court in the 2011 suit by filing an appeal. In the circumstances, the finding of fact that the plaintiff was the

lessee of the mining land with a valid lease was now res judicata and the defendant would be estopped from denying that fact. As such, by virtue of the mining lease, the application for renewal of the mining lease, the conditional approval granted by MMKN and by operation of s 66(9) of the MSE, the plaintiff had a valid and subsisting mining lease over the mining land (see paras 12, 14–15 & 18).

(2) The issue as to whether the 2005 survey plan was conclusive evidence of the boundaries and area of the mining land had been determined in the 2011 suit. Therefore, the issue was res judicata and the doctrine of estoppel would bar the defendant from raising it in subsequent proceedings (see paras 23–24).

(3) None of the situations under which the JUPEM may amend an approved stratum plan under s 396A of the NLC applied to the present case. Neither had the plaintiff consented to surrender the disputed area contained in the mining lease to the state. As such, the defendant's new survey plan could not supercede the plaintiff's 2005 survey plan. In any case the defendant's new survey plan remained an ID document. It is trite that such documents did not form part of the evidence for the court's consideration and any evidence in regards to this document was to be disregarded. Therefore the only approved survey plan before this court was the 2005 survey plan (see paras 33).

(4) Under s 5(d) of the NLC, the mining land was not part of the state land. As such, the state authority did not have any authority or power to alienate the disputed area to the defendant. In the circumstances, the land titles were issued to the defendant in contravention of the NLC. The titles were defeasible under s 340(2)(c) of the NLC. Further, by the issuance of titles to the defendant, the state authority had breached the constitutional right of the plaintiff to ownership of its property (see para 36).

(5) There had been no suppression of material facts by the plaintiff in the 2011 suit. MTES' decision directing the plaintiff to engage a licensed land surveyor to perform a new survey of the mining land was within the defendant's knowledge and it chose not to raise this issue in the 2011 suit. Further, this issue could not amount to fraud by the plaintiff merely because the plaintiff chose not to adduce that fact as evidence in the 2011 suit (see paras 41–42).

[Bahasa Malaysia summary

Plaintif mempunyai pajakan perlombongan sah untuk tanah yang dipegang di Gombak, Selangor ('tanah lombong') yang tamat pada 31 Disember 2003. Pada 16 Ogos 2002, iaitu 12 bulan sebelum tamat pajakan lombong itu, plaintif telah memohon pembaharuan untuk pajakan itu. Pada 13 Ogos 2003, Majlis Mesyuarat Kerajaan Negeri Selangor ('MMKN') memberikan plaintif

kelulusan bersyarat untuk pajakan lombong itu. Pada bulan Oktober 2010, defendan, seorang pemaju, memohon untuk memajukan tanah bersebelahan dengan tanah lombong itu. Plaintif mendapati pembangunan defendan akan menceroboh lebih kurang empat ekar ke sempadan bahagian selatan tanah lombong itu ('kawasan yang dipertikaikan'). Pada 31 Januari 2011, plaintif telah memfailkan guaman sivil terhadap defendan ('guaman 2011') untuk menentukan sempadan tanah lombong itu dan untuk deklarasi bahawa cadangan pembangunan defendan menceroboh ke atas tanah lombongnya, iaitu kawasan yang dipertikaikan. Plaintif bergantung kepada pelan ukur 2005 yang telah diluluskan oleh Pengarah Ukur dan Pelan Selangor ('JUPEM') untuk menyokong hujahnya bahawa kawasan yang dipertikaikan adalah miliknya. Di penutup perbicaraan kepada guaman 2011, Mahkamah Tinggi telah memberikan plaintif deklarasi bahawa sempadan bahagian selatan tanah lombong itu adalah seperti pelan ukur 2005 dan deklarasi bahawa apa-apa pembangunan oleh defendan yang menceroboh ke atas kawasan yang dipertikaikan akan membentuk pencerobohan ke atas tanah lombong plaintif ('perintah mahkamah 2011'). Berikutan itu, kawasan yang dipertikaikan telah diberi hak milik oleh pihak berkuasa negeri dan dibahagikan kepada lebih daripada 55 hak milik tanah bagi pihak defendan. Plaintif mengatakan bahawa defendan telah memperoleh pemilikan ke atas hak milik tanah dalam kawasan yang dipertikaikan itu selepas ia memperdayakan JUPEM untuk meluluskan pelan ukur baru, yang menetapkan bahawa kawasan yang dipertikaikan bukan lagi sebahagian daripada tanah lombong plaintif tetapi sebahagian daripada pembangunan defendan. Bagi sebab-sebab berikut plaintif telah memulakan guaman terhadap defendan. Adalah kes plaintif bahawa defendan telah memperoleh pemilikan untuk hak milik tanah dalam kawasan yang dipertikaikan daripada pihak berkuasa negeri dengan bertindak melanggar perintah mahkamah 2011, dan bahawa ini telah menyebabkan plaintif mengalami kerugian dan kerosakan. Plaintif berhujah bahawa pelan ukur baru dan hak milik tanah yang dikeluarkan bagi pihak defendan berkaitan kawasan yang dipertikaikan adalah terbatal dan tidak sah dan hak milik tanah itu dapat dibatalkan menurut s 340(2) Kanun Tanah Negara ('KTN'). Plaintif menegaskan bahawa isu tentang sama ada kawasan yang dipertikaikan adalah sebahagian daripada tanah lombong milik plaintif adalah res judicata dan defendan diestopkan daripada mengatakan ia mempunyai apa-apa hak ke atas yang sama. Defendan menjawab bahawa ia adalah tuan punya berdaftar kepada kawasan yang dipertikaikan itu, yang telah diberi hak milik kepadanya oleh pihak berkuasa negeri dan bahawa plaintif tidak memegang pajakan lombong yang sah dan berdaftar kepada tanah lombong itu. Defendan juga mencabar keesahan pelan ukur 2005 yang digunakan oleh plaintif dan berhujah bahawa pelan tersebut adalah tentang sempadan-sempadan dan bukan pemilikan. Adalah hujah defendan bahawa perintah 2011 tidak diputuskan secara konklusif berhubung pemilikan kawasan yang dipertikaikan terutamanya kerana plaintif telah gagal menunjukkan keputusan Mesyuarat Tindakan Eknomi Negeri Selangor ('MTES') mengarahkan plaintif untuk melantik

juruukur tanah berdaftar untuk melaksanakan ukur baru tanah lombong itu yang tidak termasuk kawasan yang dipertikaikan itu. Defendan oleh itu berhujah bahawa plaintif telah melakukan fraud dengan tidak mengemukakan fakta material yang telah mengelirukan mahkamah untuk menerima pelan ukur 2005 dan menerima pelan tersebut sebagai sah dan mengikat. Berikutan itu defendan telah memfailkan tuntutan balas untuk, antara lain, mengetepikan perintah 2011 sebagai terbatal dan tidak sah, ganti rugi untuk ditaksirkan, faedah dan kos.

Diputuskan, membenarkan tuntutan plaintif dan menolak tuntutan balas defendan dengan kos menyeluruh RM90,000:

(1) Wujud keterangan bahawa plaintif telah memohon pembaharuan pajakan lombong dan bahawa MMKN telah memberikannya kelulusan bersyarat. Oleh kerana plaintif tidak bersetuju dengan beberapa syarat yang ditimbulkan oleh MMKN, ia telah memfailkan rayuan terhadap syarat-syarat tersbeut. Dalam keadaan berikut, tidak boleh dikatakan bahawa permohonan pembaharuan itu telah ditentukan secara muktamad, sebagaimana dikemukakan oleh defendan. Oleh itu menurut s 66(9) Enakmen Galian (Selangor) 2000 ('EGS'), terma-terma pajakan lombong yang telah luput akan terus berkuat kuasa sehingga permohonan pembaharuan ditolak atau diluluskan. Selanjutnya, kelewatan di pihak plaintif tidak menjejaskan kelulusan pembaharuan pajakan. Tambahan pula, defendan tidak mencabar penemuan Mahkamah Tinggi dalam guaman 2011 dengan memfailkan rayuan. Dalam keadaan berikut, penemuan fakta bahawa plaintif adalah pemegang pajakan tanah lombong dengan pajakan sah adalah sekarang res judicata dan defendan akan diestop daripada menafikan fakta tersebut. Oleh itu, menurut pajakan lombong itu, permohonan pembaharuan untuk pajakan lombong itu, kelulusan bersyarat yang diberikan oleh MMKN dan melalui operasi s 66(9) EGS, plaintif mempunyai pajakan sah dan masih wujud ke atas tanah lombong itu (lihat perenggan 12, 14–15 & 18).

(2) Isu sama ada pelan ukur 2005 adalah keterangan konklusif berhubung sempadan dan kawasan tanah lombong itu telah pun ditentukan dalam guaman 2011. Oleh itu, isu res judicata dan doktrin estopel akan membataskan defendan daripada menimbulkannya dalam prosiding seterusnya (lihat perenggan 23–24).

(3) Tiada keadaan di mana JUPEM boleh meminda pelan stratum yang telah diluluskan di bawah s 396A KTN yang terpakai dalam kes ini. Plaintif juga tidak bersetuju untuk menyerahkan kawasan yang dipertikaikan terkandung dalam pajakan lombong itu kepada pihak berkuasa negeri. Dalam sebarang keadaan pelan ukur baru defendan masih kekal dokumen pengenalan. Adalah tetap bahawa dokumen sedemikian tidak

membentuk sebahagian daripada keterangan untuk pertimbangan mahkamah dan apa-apa keterangan berkaitan dokumen ini patut tidak diterima. Oleh demikian pelan ukur yang diluluskan hanyalah pelan ukur 2005 (lihat perenggan 33).

(4) Di bawah s 5(d) KTN, tanah lombong itu bukan sebahagian daripada tanah kerajaan negeri. Oleh itu, pihak berkuasa negeri tidak mempunyai apa-apa autoriti atau kuasa untuk memberi hak milik kawasan yang dipertikaikan itu kepada defendan. Dalam keadaan berikut, hak milik tersebut telah dikeluarkan kepada defendan bertentangan dengan KTN. Hak milik tersebut boleh dibatalkan di bawah s 340(2) KTN. Selanjutnya, dengan pengeluaran hak milik itu kepada defendan, pihak berkuasa negeri telah melanggar hak perlembagaan plaintif berhubung pemilikan hartanahnya (lihat perenggan 36).

(5) Tiada penindasan fakta berhubung fakta material oleh plaintif dalam guaman 2011. Keputusan MTES mengarahkan plaintif melantik juruukur tanah berlesen untuk melaksanakan ukur baru ke atas tanah lombong itu adalah dalam pengetahuan defendan dan ia telah memilih untuk tidak menimbulkan isu ini dalam guaman 2011. Selanjutnya, isu ini tidak boleh membentuk fraud oleh plaintif hanya kerana plaintif memilih untuk tidak mengemukakan fakta tersebut sebagai keterangan dalam guaman 2011 (lihat perenggan 41–42).]

Notes

For cases on claim for ownership, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 4014–4023.

Cases referred to

Lebbey Sdn Bhd v Chong Wooi Leong & Anor and other applications [1998] 5 MLJ 368,, HC (refd)

PP v Datuk Haji Harun bin Haji Idris & Ors [1977] 1 MLJ 180 (refd)

Saminathan v Pappa [1981] 1 MLJ 121, PC (refd)

Shamsudin bin Che Mat & Ors v Datuk Bandar Kuala Lumpur [2000] 4 MLJ 177, HC (refd)

Uptown Properties Sdn Bhd v Pentadbir Tanah Wilayah Persekutuan & Ors [2012] MLJU 131, HC (refd)

Legislation referred to

Constitution of the State of Selangor cl 50

Federal Constitution art 13(1)

Mineral (Selangor) Enactment 2000 ss 2, 63, 63(12) 66(2), (9), 124, Form F Schedule 1

National Land Code ss 5, 5(d), 340(2)(b), (c), 392(2), 396(2), 396A, 417

Leong Wai Hong (Aufa Radzi and Eyza Farizan Mokhtar with him) (Skrine) for the plaintiff.
Gregory Ling (Kenneth Goh and Adeline Yew with him) (Ranjit Singh & Yeoh) for the defendant.

Vazeer Alam Mydin JC:

[1] The facts leading to the plaintiff's claim and the defendant's counterclaim is well set out in the submissions of counsel for the defendant and I have set them out below.

[2] The plaintiff has pleaded in the statement of claim ('SOC') the following:

(a) the plaintiff is and was at all times, a lessee of land held under Lot 20146, Bandar Rawang, Daerah Gombak, Selangor ('the mining land') for mining purposes under s 63 of the Mineral (Selangor) Enactment 2000 ('MSE'). The said mining lease dated 1 January 1984 ('the mining lease') was for a period expiring on 31 December 2003;

(b) by a letter dated 16 August 2002, the plaintiff applied to the Pejabat Tanah dan Galian, Selangor ('PTG') for a renewal of the mining lease ('renewal application') and by a letter dated 26 April 2004, the PTG conveyed the conditional approval of the renewal application ('approval letter') by the *Majlis Mesyuarat Kerajaan Negeri* ('MMKN');

(c) sometime in 2004, upon the request of the then Selangor State Government, the plaintiff agreed to surrender a part of the mining land for the purpose of squatter relocation undertaken by the state government;

(d) the mining land was then surveyed on 24 January 2005 and a new southern boundary that was proposed by the plaintiff to the state authority ('state authority') back in 2004 was ascertained and confirmed in a survey plan bearing no PA 103485 ('2005 survey plan'). On 28 June 2005, this 2005 survey plan was approved by the Director of Survey and Mapping Selangor ('JUPEM');

(e) sometime in October 2010, the plaintiff discovered that the defendant was seeking to develop the land adjacent to the mining land and had submitted a housing development plan for approval by the authorities ('the defendant's development plan');

(f) the defendant's development plan showed that the defendant's proposed development would encroach onto land, within the plaintiff's buffer zone, measuring approximately 4 acres at the southern boundary of the mining land ('the disputed area');

(g) accordingly, on 31 January 2011, the plaintiff filed a civil suit against the defendant in the Kuala Lumpur High Court Suit No S-22NCVC-96 of 2011 ('2011 suit') to determine the boundary of the mining land and for a declaration that the defendant's proposed development encroached onto the mining land, namely the disputed area;

(h) on 25 February 2011, a consent injunction order was recorded between the parties before the Honourable Judicial Commissioner Lee Swee Seng providing for certain injunctive relief pending the trial of 2011 suit;

(i) on 8 July 2011, at the trial of the 2011 Suit, the then High Court Judicial Commissioner the Honourable Amelia Tee Hong Geok bt Abdullah ('Justice Amelia Tee') granted the following orders in favour of the plaintiff ('8 July 2011 order'):

(i) a declaration that the new southern boundary of the mining land was as per the 2005 survey plan; and

(ii) a declaration that any development by the defendant that encroaches into the southern boundary in the 2005 survey plan would constitute an encroachment into the boundary of the mining land;

(j) as the defendant did not appeal against, set aside or stay the 2011 court order, the plaintiff considers the 8 July 2011 order as having validly and conclusively decided that the disputed area belongs to the plaintiff as part of the mining land;

(k) therefore, the plaintiff avers that the issue as to whether the disputed area is part of the mining land belonging to the plaintiff is res judicata and the defendant is estopped from alleging it has any rights over the same;

(l) it is alleged by the plaintiff that the defendant breached the 8 July 2011 order when the defendant, 'behind the plaintiff's back', obtained ownership of land titles from the state authority for land situated within the disputed area. The plaintiff states that:

(i) on 22 June 2011, the Selayang Municipal Council ('MPS') approved a 'pelan pra-hitungan' No JB/2007/007/H/6 ('precomputation plan');

(ii) on 17 November 2011, JUPEM approved a new survey plan PA 203694 ('new survey plan') which stipulated that the disputed area is no longer part of the plaintiff's mining land but was now part of the defendant's development; and

(iii) the disputed area was alienated by the state authority and subdivided into more than 55 sub-divided land titles, in favour of the defendant ('land titles');

(m) the plaintiff contends the new survey plan, the precomputation plan and the land titles are all null and void and that the land titles are defeasible pursuant to s 340(2)(b) and (c) of the NLC. In this regard, the plaintiff made the following allegations against the defendant:

(i) that the defendant 'misled' (JUPEM) to approve the new survey plan in the defendant's favour in blatant breach of the 8 July 2011 order; and

(ii) that the defendant had 'acted in bad faith' as the pre-computation plan was approved on 22 June 2011 when the 2011 Suit was still ongoing;

(n) by reason of the above, the plaintiff argues that it has suffered loss and damage and seeks the reliefs mentioned below.

[3] The plaintiff is seeking the following relief:

(a) a declaration that land titles held in the defendant's name as in Appendix A to the statement of claim are part of the mining land belonging to the plaintiff pursuant to the mining lease;

(b) a declaration that all individual land titles listed in the said Appendix A are null and void;

(c) a declaration that Survey Plan PA 103485 ('2005 Survey Plan') is valid, binding and sets out the correct boundary of the mining land;

(d) a declaration that the High Court order dated 8 July 2001 ('8 July 2011 order') reflects the correct boundary of the mining land;

(e) an injunction to restrain the defendant from encroaching or proceeding with developing and carrying out any works on the encroached area ('Disputed Area') as shown in the land titles in Appendix A;

(f) an order under s 417 of the National Land Code ('NLC') and pursuant to the court's inherent powers directing the registrar or land administrator to rectify the register by cancelling the name of the defendant on the register documents of title for land held under the titles listed in the said Appendix A;

(g) general damages; and

(h) cost.

[4] Pending trial, the plaintiff obtained the following interlocutory injunction orders:

(a) on 29 March 2012, the plaintiff obtained on ex parte injunction order,

A inter alia, restraining the defendant from proceeding with the defendant's development on the disputed area pending the inter parties hearing; and

(b) on 10 April 2012, this court granted an inter partes injunction order pending trial.

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[5] The defendant's defence is set out in its defence as follows:

(a) the defendant is currently the registered proprietor of the disputed area as it was alienated by the state authority to the defendant in December 2011;

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(b) the plaintiff, is not a lessee of the mining land as it does not currently possess a valid and registered mining lease. The approval letter did not amount to a mining lease and was merely a conditional approval for a mining lease ie it is subject to certain conditions and payments of which the plaintiff has failed to fulfill;

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(c) the proposal as to the new southern boundary (including the proposed buffer zone of a minimum distance of (i) 200 metres between the plaintiff's primary crusher and the nearest house and (ii) 14.5m between the plaintiff's secondary crusher and the nearest house ('the plaintiff's suggested buffer zone') was never approved by the MMKN;

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(d) instead, a buffer zone of 100m was ultimately approved by MMKN in the precomputation plan ('approved buffer zone');

(e) the approval of the 2005 survey plan by JUPEM did not mean that the mining land belonged to the plaintiff. The 2005 survey plan dealt with 'boundaries' and not 'ownership' of the surveyed land and was in any event subject to a fresh mining lease to be eventually issued to the plaintiff;

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G (f) further, the validity of the 2005 survey plan is in question as:

(i) on 2 March 2011, MMKN made the decision to take away the plaintiff's right over the disputed area;

(ii) on 9 March 2011, the MMKN made the decision that the PTG was to write to the plaintiff directing them to perform a new survey plan via a licensed land surveyor and in doing so, exclude the disputed area;

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(iii) on 10 March 2011, the *Mesyuarat Tindakan Ekonomi Negeri Selangor* ('MTES') of the state government, also made the decision that PTG write to the plaintiff directing them to perform a new survey plan via a licensed land surveyor and in doing so, exclude the disputed area;

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(iv) accordingly, by a letter dated 11 March 2011, PTG wrote to the

plaintiff informing them of the MTES decision and directing them to engage a licensed land surveyor to perform a remeasurement of the mining land and exclude the disputed area from the new survey, within two weeks from receipt of the letter ('11 March 2011 PTG letter'); and

(v) the above directive from PTG would mean that the 2005 survey plan would eventually be amended and replaced by a new survey plan pursuant to s 396A of the NLC;

(g) meanwhile, the defendant had submitted to carry out the defendant's development as far back as 2007. The defendant's development is actually a project to resettle squatters of Kampung Rawang Tin and was eventually approved by MMKN on 22 July 2009 ('resettlement project');

(h) the 8 July 2011 order, ie the decision after trial in the 2011 suit did not conclusively decide as to the ownership of the disputed areas;

(i) in addition, the plaintiff failed to disclose to Justice Amelia Tee that (i) they had not been issued a mining lease certificate and (ii) had received the letter dated 11 March 2011 from PTG directing them to perform a new survey plan to exclude the disputed area. Accordingly, the 8 July 2011 order is not binding upon the defendant and the defendant is not estopped from claiming that the disputed area belongs to the defendant; and

(j) the new survey plan, the precomputation plan and the land titles were all properly approved by MMKN and the relevant authorities and are therefore valid and binding against the plaintiff.

[6] In turn, the defendant filed a counterclaim against the plaintiff in the following terms:

(a) the plaintiff committed fraud in withholding material facts and/or suppressing the 11 March 2001 PTG letter, thereby misleading the court in the 2011 suit into accepting the 2005 survey plan as valid and binding. The particulars are, inter alia, that:

(i) the plaintiff had fulfilled all the conditions and payments imposed upon them for the mining lease;

(ii) the 2005 survey plan was conclusive evidence of the boundaries of the mining land when the mining lease certificate itself had yet to be issued; and

(iii) the 2005 survey plan was valid and binding. In this regard, the plaintiff failed to disclose that they had received the 11 March 2011 PTG letter and that till today the plaintiff has yet to comply with PTG's direction to prepare the new survey plan;

(b) the defendant did not raise this during the 2011 suit as they were not aware of its existence;

(c) further and/or in the alternative, there were subsequent changes in the circumstances that led to fresh material evidence that could not be adduced during the 2011 suit through reasonable diligence:

(i) prior to December 2011, the disputed area was state land within the purview of the state authority;

(ii) on 19 October 2011, the precomputation plan was approved by MMKN confirming that the state authority had agreed that the disputed area form part of the resettlement project;

(iii) on 17 November 2011, the new survey plan was approved by JUPEM confirming that the disputed area was now part of the re-settlement project; and

(iv) in December 2011, state land, including the disputed area, was alienated by the state authority to the defendant for the re-settlement project;

(d) consequent to the above, the 8 July 2011 order is null and void and open to be impeached and set aside by court;

(e) the plaintiff has continued to interfere with the defendant's development including but not limited to restraining the defendant's development pending the conclusion of this trial. Notwithstanding that, the defendant has already entered into approximately 136 sale and purchase agreements ('SPAs') (124 with the squatters and 12 with the general public) to build and deliver units within twenty four (24) months from the date of the SPAs; and

(f) the defendant therefore seeks to be indemnified for all the losses, claims, expenses and/or costs that may arise out of the delay/failure to complete the presettlement project.

[7] Therefore, the defendant is seeking the following relief:

(a) a declaration that the 2011 court order is null and void and of no effect and that the 2011 court order be set aside;

(b) a declaration that the 2005 survey plan is null and void and not binding upon the defendant.

(c) a declaration that the new survey plan is valid and binding upon the plaintiff and sets out the boundaries, boundary marks and area of lands designated for the resettlement project;

(d) an order that the plaintiff appoints a licensed land surveyor to remeasure the area for the plaintiff's mining lease/mining land and to exclude the

disputed area to conform with the new survey plan and to amend the 2005 survey plan to reflect the changes, within 14 days from the date of the order failing which the defendant shall appoint a licensed land surveyor to perform the same;

(e) damages to be assessed by the senior assistant registrar whereupon the assessed damages are to be paid by the plaintiff to the defendant;

(f) interest on the assessed damages at a rate and period to be determined by the court; and

(g) costs.

[8] There are several core issues for determination by this court and I will take them one by one.

ISSUE NO 1

Does the plaintiff have a valid mining lease?

[9] The Mineral (Selangor) Enactment 2000 ('MSE') regulates the issuance of mining leases in the State of Selangor. Section 2 of the MSE defines mining lease and mining land as follows:

'mining lease' means a mining lease granted under section 63 and a mining lease granted or issued under any previous written law relating to mining; and

'mining land' means any land in respect of which a mining lease or proprietary mining licence is for the time being in force.

[10] It is common ground that the state authority had issued the plaintiff a mining lease dated 1 January 1984 ('the old mining lease') for a period expiring on 31 December 2003. Section 124 of the MSE provides that:

Every mining lease or mining certificate subsisting at the commencement of this Enactment shall continue to be in force under the Mining Enactment Selangor under which it was issued until the expiration thereof.

[11] Therefore, the plaintiff had a valid mining lease expiring on 31 December 2003. A mining lease may be renewed under s 66(2) of the MSE and once the application for renewal is made at least 12 months prior to the expiry of the mining lease, s 66(9) of the MSE provides that the term of the lease shall continue in force in respect of the land to which the application relates until the application is determined.

[12] Again there is uncontroverted evidence that the plaintiff had applied for

A the renewal of the mining lease 12 months before expiry and the *Majlis Mesyuarat Kerajaan Negeri Selangor* (MMKN) had on 13 August 2003 approved the plaintiff's application for a renewed period of 21 years, subject to conditions. This is reflected in the approval letter.

B

[13] The plaintiff had appealed against some of the conditions and complied with others. In fact it is the evidence of the plaintiff that the state authority had agreed to amend or waive some of the conditions. Therefore, the renewal of the mining lease was an on going process. As a result of this, the final determination
C of the renewal which is the issuance of the new mining lease certificate had not been made.

[14] The counsel for the defendant argues that the application for renewal had been determined when the approval by the MMKN was given on
D 13 August 2003 and the same was conveyed to the plaintiff via the PTG Selangor letter dated 26 April 2004. I am, with respect, unable to agree with that proposition. The approval was a conditional one and the plaintiff was not agreeable to some of the conditions and had filed an appeal against those conditions. The state authority was considering the appeal. In the
E circumstance, it cannot be gain said that the renewal application had been determined with finality. Final determination of the application for renewal will come about when either there is rejection of the application (and any appeal of that rejection is also rejected) or approval leading to the issuance of a new mining lease certificate is completed. Here, there was conditional approval
F and the final determination of that process leading to the issuance of the mining lease certificate was in progress.

[15] Therefore, it is my finding that pursuant to the provisions of s 66(9) of
G the MSE, the term of the old mining lease shall continue in force until the renewal application is determined with finality and a fresh mining lease certificate is issued by the relevant authority.

[16] The defendant's counsel also submits that there has not been timely
H compliance by the plaintiff of the conditions for renewal imposed by the state authority and therefore the plaintiff cannot be said to have complied with the conditions for renewal. Though they may have been some instances of delay on the part of the plaintiff; I find that the delay does not in any way vitiate the lease renewal approval. The state authority and the PTG have until the date of trial
I dealt with the plaintiff as if the lease renewal approval was valid and in force. The conduct of the PTG was such that the plaintiff was always regarded as a lessee in continuance of the old mining lease. In any event, whether or not the plaintiff is entitled to be issued with a new mining lease certificate is not an issue between the plaintiff and the defendant.

[17] In any event in the earlier 2011 suit, Justice Amelia Tee had made a finding at para 32 of the grounds of judgment that:

> It is not in dispute that the plaintiff was a lessee of the quarry land located at ML 6 Lot 4222 Bandar Rawang, Daerah Gombak, Selangor for mining purposes under s 63 of the Mineral Enactment (Selangor) 2000. It is also not in dispute that the Majlis Mesyuarat Kerajaan Negeri Selangor had on 13 August 2003 approved the plaintiff's application for a mining lease for a period of 21 years, subject to conditions. This is reflected in the PTG Selangor letter dated 26 April 2004.

The reference to ML 6 Lot 4222 Bandar Rawang, Daerah Gombak, Selangor, in that grounds of judgment was in fact a reference to the old lot number of the mining land. The defendant did not challenge this finding by filing an appeal. In this regard, that finding of fact, that the plaintiff was the lessee of the mining land with a valid lease, is now res judicata and the defendant would be estopped from denying that fact. As explained by PW2 Mr Yap Sze Pin, once the mining lease is renewed, and a fresh mining lease ('fresh mining lease') is issued, the plaintiff would get a title in continuation in respect of the mining land. I agree that is the law.

[18] Therefore, I find that by virtue of the mining lease, the application for renewal of the mining lease, the conditional approval granted by MMKN, and by operation of s 66(9) of the MSE, the plaintiff has a valid and subsisting mining lease over the mining land even though a fresh mining lease certificate has not been issued.

[19] In any event s 63(12) of the MSE states that if the application for mining lease is granted, the director shall, as soon as practicable after being notified by the state authority, upon the payment of the prescribed fee; payment of the first year's rent; payment of survey fee and survey carried out by the survey officer, and payment of the fee for the mining lease plan, issue the a mining lease under Form F as set out in Schedule 1 of the MSE. In fact, PW1 had testified that all requirements under s 63(12) of the MSE had been complied with by the plaintiff and all that remained was the issuance of the certificate. Further, PW2 in his testimony had said that it is not uncommon for the certificate of mining lease to be issued years after compliance of the requirements of the law and the conditions imposed by the state authority.

ISSUE NO 2

Whether the plaintiff's 2005 survey plan is conclusive evidence of the boundaries, boundary marks and area of the mining land

[20] PW2 Mr Yap Sze Pin, a qualified licensed surveyor since 1972 and who had once held the position of Deputy Director of Survey and Mapping for

Kedah and Perlis from 1973–1975, testified that the 2005 survey is in fact the final cadastral survey plan bearing plan no PA 103485 which was approved by the director of survey and mapping on 28 June 2005. PW2 explained that the effect of a final cadastral survey plan which has been approved by the director of survey and mapping is that it is conclusive evidence of the boundaries, boundary marks and area of the land to which it refers, and of the area and the lot number thereof. PW2 relies upon the provisions of s 396(2) of the National Land Code ('NLC') to arrive at that conclusion. Now s 396(2) of the NLC reads as follows:

> Any plan approved by the Director of Survey and Mapping under paragraph (e) of sub-section (1) shall be filed in his office, and (without prejudice to the operation of section 49 in the case of land subsequently affected by any advance of the shore-line or of the bed of any river) shall be conclusive evidence of the boundaries, boundary marks of the land to which it refers and of the area and the lot number thereof.

[21] The final cadastral plan enables the registrar to determine the boundary and location of the land comprised in the title prior to issuing the document of title or in this case the mining lease certificate. That is the reason why the plaintiff was asked to carry out the survey of the mining land in 2005, as part of the conditions the approval letter. In short, it is a prerequisite for the issuance of the mining lease certificate.

[22] The defendant contents that s 392(2) of the NLC is only applicable to the states of Penang and Malacca and to the State of Selangor. I am unable to accept that contention as the notes to s 396(2) of the NLC stipulates that:

> This subsection, in its application to the states of Penang and Malacca shall be modified by deleting the words 'conclusive evidence' and the following words and substituting therefor the words 'conclusive evidence of the boundaries, boundary marks and area of the land to which it refers and prima facie evidence of the lot number there of'.

The words in bold were a modification of s 396(2) as it applied to the States of Penang and Malacca, as modified by the National Land Code (Penang and Malacca) Order 1968 (PU 500/68). Therefore, it is not that the entire s 396(2) of the NLC is not applicable to states other than Penang and Malacca but only that in respect of its application to Penang and Malacca it will be in its modified form.

[23] In any event, the issue whether the 2005 survey plan is conclusive evidence of the boundaries, boundary marks and area of the mining land has been determined by Justice Amelia Tee in the 2011 suit and can be seen at para 46 of the grounds of judgment that reads:

> No evidence has been adduced by the defendant to show that the plan CB 1 p 3 had ever been amended by the director of survey and mapping under s 396A of the National Code Code 1965. In the absence of any such evidence the court finds the survey plan as in CB 1 p 3 would be the authoritative and conclusive survey plan which sets out the boundaries of the plaintiff's quarry land.

[24] Therefore, I find that the matter of the conclusiveness of the 2005 survey plan is res judicata and the doctrine of issue estoppel would bar the defendant from raising it in subsequent proceedings.

ISSUE NO 3

Does the defendant's new survey plan PA 203694 supersede the plaintiff's 2005 survey plan

[25] The defendant submits if the plaintiff had followed the directive of the PTG contained in the PTG's letter dated 11 March 2011 and carried out a resurvey then the 2005 survey plan would have been amended to exclude the disputed area and there would be no overlap.

[26] In that PTG's letter dated 11 March 2011 (exh D15 at p 46 bundle E) the plaintiff was informed that the *Mesyuarat Majlis Tindakan Ekonomi Negeri Selangor* (MTES) held on 10 March 2011 had decided that the plaintiff was to carry out a resurvey of the mining land and to exclude the disputed area from the area of the mining land. The plaintiff was requested to give its response to this request within two weeks from receipt of that letter.

[27] The plaintiff replied to the PTG by way of letter dated 24 March 2011 (pp 491–492 bundle B) asking that the decision of MTES be kept in abeyance. Further, the plaintiff informed the PTG that the matter was pending resolution in the court (the 2011 suit) and requested that the court rule it on. The relevant part of that letter reads:

> Tambahan lagi, isu pertindihan tanah pajakan lombong APMC dengan kawasan yang telah diluluskan untuk pembangunan yang dicadangkan oleh Westwood Development Sdn Bhd telah diarahkan oleh Mahkamah Tinggi Kuala Lumpur untuk dibicarakan dengan sepenuhnya. Oleh yang demikian, status perkara ini perlulah dikekalkan sehingga isu-isu di dalam kes ini habis dipertimbangkan oleh pihak Mahkamah Tinggi.

[28] I find that, contrary to the defendant's assertion, the plaintiff is not obliged to follow the decision of the MTES for several reasons. Firstly, the plaintiff had a valid mining lease and the mining land was comprised in the mining lease. The mining land is not state land. The state authority cannot

A excise any portion of land contained in a valid mining lease without the agreement of the lessee. This was in fact the evidence of PW2. Secondly, no evidence was led in respect of this entity called the MTES — under what authority was it formed, where do they derive their powers from, etc. Under the NLC the power to issue or renew a mining lease is vested with the state B authority. In *Lebbey Sdn Bhd v Chong Wooi Leong & Anor and other applications* [1998] 5 MLJ 368 Abdul Wahab J held that:

> State authority under the Code is defined, for the purposes of the State of Selangor, as the Ruler. For practical purposes, this means the Ruler acting upon the recommendation of the Exco of the state.

C

That is the generally regarded proposition of law in so far as the exercise of state executive authority is concerned and it has found further judicial support by Faiza Thamby Chik J in *Shamsudin bin Che Mat & Ors v Datuk Bandar Kuala Lumpur* [2000] 4 MLJ 177 where he held:

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> And the Ruler, by virtue of cl 55 of the Selangor State Constitution, must act on the advice of the State Executive Council except for certain functions which he may act in his discretion. By cl 50 of that State Constitution, the executive authority of the state shall be vested in the Ruler but executive functions may by law be conferred on other persons or authorities. A licence or consent from any other person, therefore, as in this case, be it the local government official, land administrator, district officer, minister, member of parliament, state assemblyman or anyone else in a position of authority certainly would not suffice.

E

F **[29]** The defendant has failed to adduce any evidence that the executive authority or power of the state authority under the NLC had been conferred onto the MTES pursuant to cl 50 of the Selangor State Constitution. In the absence of that evidence, I find that the MTES does not have any authority to direct the plaintiff to carry out any resurvey of the 2005 survey plan.

G

[30] Thirdly, the issue of the boundary and the disputed area was pending resolution under the 2011 suit and as properly point out by the plaintiff to the PTG, it was better to preserve status quo and have the matter determined by the court. In fact the MMKN at its meeting held on 9 March 2011 and as H shown in the minutes of meeting (at pp 43–45 of bundle E) had decided to suspend the defendant's development pending the judgment of the court in the 2011 suit.

[31] That view also finds support in the letter dated 24 February 2011 issued I by the state legal advisor to YB Gan Pei Nei, *Ahli Dewan Undangan Negeri Rawang* (at pp 55–60 of bundle E) where the state legal advisor had also recommended that any decisions made by the state authority should not affect or interfere with court proceedings in the 2011 suit. In fact DW2 in cross-examination had agreed that the position of the state authority at the

material time was to let the court decide on the issue. Therefore, it is strange that the resurvey was directed to be done MTES.

[32] Fourthly, any amendment to the 2005 survey plan can only be done in situations provided for in s 396A of the NLC which provides that:

> (1) The Director of Survey and Mapping shall amend the stratum plan approved by him under paragraph (e) of sub-section (1) of section 396 if-
>
> (a) he is satisfied that such stratum plan contains an error or omission, or
>
> (b) any alienated land becomes included within the boundaries of a new district, new sub-district, new mukim, new town or new village as a result of notification in the Gazette under section 11 or by virtue of such powers under any previous land law, or
>
> (c) any alienated land has ceased to be part of any town, village or mukim.

[33] I find that none of the situations under which the director of survey and mapping may amend an approved stratum plan under s 396A of the NLC applies to the present case. Neither has the plaintiff consented to surrender the disputed land that is contained in the mining lease to the state. Therefore, I find that the defendant's new survey plan PA 203694 cannot supersede the plaintiff's 2005 survey plan.

[34] In any event, the defendant's survey plan remained an ID document, being marked as 'IDD-14'. An ID document is not a document that has been properly admitted as evidence at trial. It is trite that such documents do not form part of the evidence for the court's consideration and any evidence or testimony in regards to these document are to be disregarded (see *Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180). Therefore, the only approved survey plan before this court is the 2005 survey plan of the plaintiff.

ISSUE NO 4

Can part of the mining land be alienated by the state to the defendant?

[35] A good starting point to answer this question would be the definition of 'State land' in s 5 of the NLC which reads:

> 'State land' means all land in the State (including so much of the bed of any river, and of the foreshore and bed of the sea, as is within the territories of the State or the limits of territorial waters) other than —
>
> (a) alienated land;

A

(b) reserved land;

(c) mining land;

(d) any land which, under the provisions of any law relating to forests (whether passed before or after the commencement of this Act) is for the time being reserved forest.

B

[36] Therefore, clearly under sub-s (d) mining land is not part of state land. The state authority can only alienate state land, as 'alienate' under s 5 of the NLC means:

C

to dispose of State land in perpetuity or for a term of years, in consideration of the payment of rent, and otherwise in accordance with the provisions of section 76 or, when used in relation to the period before the commencement of this Act, to dispose of State land in perpetuity or for a term of years under a previous land law (not being a law relating to mining).

D

The disputed area for reasons discussed earlier is mining land as defined in the s 5 of the NLC. Therefore, I find that the state authority does not have any authority or power to alienate the disputed area to the defendant.

E

ISSUE NO 5

Are the defendant's titles for the disputed area indefeasible?

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[37] The plaintiff submits that the defendant's titles are not indefeasible on the grounds that they were obtained through insufficient or void instrument, ie the invalid new survey plans and/or that they are unlawful under s 340(2)(b) and (c) of the NLC.

G

[38] I agree that the titles are defeasible by reason of the fact that the titles were issued in contravention of the stipulation of the National Land Code in that land that is not state land had been alienated to the defendant. The purported exercise of the powers by the registrar in issuing the titles to the defendant is clearly unlawful and the titles are defeasible under s 340(2)(c) of the NLC which provides that:

H

The title or interest of any such person or body shall not be indefeasible —

(a) …

I

(b) …

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

[39] The act of the registrar in issuing the titles to the defendant in respect of the disputed area has been done arbitrarily with due regard to the interest of the plaintiff. The plaintiff's rights over the disputed area, which I find is part of the mining land, has been trampled and violated by the issuance of these titles to the defendant. In fact art 13(1) of the Federal Constitution provides that a person shall not be deprived of property save in accordance with law. I find that by the issuance of the titles to the disputed area to the defendant, the state authority has breached the constitutional right of the plaintiff to ownership of its property for the plaintiff has been deprived of its property not in accordance with law (see the case of *Uptown Properties Sdn Bhd v Pentadbir Tanah Wilayah Persekutuan & Ors* [2012] MLJU 131).

ISSUE NO 6

The defendant's counterclaim

[40] The defendant alleges that the plaintiff had suppressed material facts from the 2011 suit and had committed fraud in not producing the letter dated 11 March 2011 from the PTG. The plaintiff denies this allegation.

[41] I find that there has been no suppression of material facts by the plaintiff in the 2011 suit. DW2 agreed in his testimony that he was present during the MTES meeting which decided that a fresh survey was to be conducted. Since that matter was known to the defendant's (through DW2), I agree with the plaintiff's counsel that the defendant could have raised this issue at the trial of the 2011 suit. The defendant chose not to and it is now too late to accuse the plaintiff of deliberate suppression of material facts. In any event, for reasons discussed earlier, I do not find the MTES decision to be material or relevant to the 2011 Suit.

[42] Further, I do not find the non-production of the 11 March 2011 letter from the PTG amount to an act of fraud. In *Saminathan v Pappa* [1981] 1 MLJ 121 the Federal Court's ruling that in fraud cases, the burden of proof must be proved beyond reasonable doubt was upheld by the Privy Council. The defendant bears that heavy burden and I find that it has failed to discharge that burden. Again, I reiterate that the MTES decision conveyed to the plaintiff in that PTG's letter was known to the defendant, though the letter itself may not be within the defendant's knowledge then. I fail to see how a matter that is already known to the defendant, and where the defendant's officer were present when that decision was made, can amount to fraud by the plaintiff merely because the plaintiff chose not to adduce that fact as evidence in the 2011 Suit. If the defendant thought that it was a material and relevant fact for the court to consider then the defendant could and should have adduced it in evidence.

[43] In the premise of the foregoing, I find that the plaintiff has proved its case and the defendant has failed to prove its counterclaim. Therefore, I allowed the plaintiff's claim and dismissed the defendant's counterclaim with cost. Accordingly judgment was entered for the plaintiff and the following orders were made:

(a) a declaration that all the land titles held in the name of the defendant under the titles listed in Appendix A to the statement of claim are part of the land granted to the plaintiff by the Pejabat Tanah dan Galian, Selangor Darul Ehsan under a mining lease for 21 years approved vide letter dated 26 April 2004;

(b) a declaration that all the individual land titles listed in the said Appendix A are null and void;

(c) a declaration that Survey Plan No PA 103485 is valid, binding and sets out the correct boundary of the land granted to the plaintiff by the Pejabat Tanah dan Galian, Selangor Darul Ehsan under a mining lease for 21 years vide approval letter dated 26 April 2004;

(d) a declaration that the High Court Order dated 8 July 2011 reflects the correct boundary of the land granted to the plaintiff by the Pejabat Tanah dan Galian, Selangor Darul Ehsan under a mining lease for 21 years vide approval letter dated 26 April 2004;

(e) an injunction to restrain the defendant whether by itself, its directors, officers, employees, servants or agents or any business or company controlled by it as the case may be or any of then or otherwise howsoever from encroaching or proceeding with developing and carrying out any works whatsoever on the encroached area as shown in the titles for the land held under the titles listed in the said Appendix A;

(f) an order under s 417 of the National Land Code and pursuant to the court's inherent powers directing the registrar or land administrator to rectify the register by cancelling the name of the defendant on the register documents of title for the land held under the titles listed in the said Appendix A;

(g) that general damages be assessed; and

(h) cost of RM90,000 globally for the trial and all interlocutory applications be paid by the defendant to the plaintiff.

Plaintiff's claim allowed and defendant's counterclaim dismissed with costs of RM90,000 globally.

Reported by Kohila Nesan